

1 UNITED STATES BANKRUPTCY COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 (SAN JOSE DIVISION)
4

5 In re:

6 THE BILLING RESOURCE,

Case No. 07-52890-ASW

7 Chapter 11

8 San Jose, California
9 November 27, 2007
11:05 a.m.

Debtor.

10 _____/
11 THE BILLING RESOURCE, dba
12 INTEGRETTEL, a California
corporation,

13 Plaintiff,

14 v.

A.P. No. 07-5156

15 DAVID R. CHASE, et al.,

16 Defendants.
17 _____/

18 TRANSCRIPT OF PROCEEDINGS
19 a) MOTION FOR ORDER TO SHOW CAUSE REGARDING
PRELIMINARY INJUNCTION RE ORDER TO STAY ENFORCEMENT
OF OMNIBUS ORDER
20 b) SUPPLEMENTAL OPPOSITION BY FEDERAL TRADE COMMISSION
21 c) RESPONSE BY DAVID R. CHASE

22 BEFORE THE HONORABLE ARTHUR WEISSBRODT
23 UNITED STATES BANKRUPTCY JUDGE
24
25

1 APPEARANCES:

2

3 For the Debtor:

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For the Federal Trade
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1 P R O C E E D I N G S

2 November 27, 2007

11:05 a.m.

3 ---oOo---

4 THE CLERK: This is the United States Bankruptcy
5 Court for the Northern District of California. The court
6 is now in session.

7 THE COURT: Good morning, ladies and gentlemen.
8 May I have appearances of counsel on the telephone. First,
9 counsel for the Unsecured Creditors' Committee. Mr. Fiero?

10 THE OPERATOR: Your Honor, his office advised me
11 that he would be dialing in.

12 THE COURT: I can't hear you, Operator.

13 THE OPERATOR: His office advised me that he would
14 be dialing in.

15 THE COURT: Oh, okay. And what about Ms. Guerard?

16 MS. GUERARD: Collot Guerard for the Federal Trade
17 Commission in Washington, D.C.

18 THE COURT: Thank you. Go off the record for a
19 second.

20 Back on the record, I'm sorry. Mr. Sacks, state
21 your appearance again.

22 MR. SACKS: Steven Sacks of Sheppard, Mullin, for
23 the Debtor.

24 THE COURT: Who else is on the phone?

25 MR. MORA: Your Honor, Michael Mora for the

1 Federal Trade Commission. Also with us is John Singer.

2 THE COURT: Very good. Anybody else?

3 MR. OETZELL: Yes, Your Honor, Walter Oetzell of
4 Danning, Gill, Diamond and Kollitz on behalf of the Federal
5 Receiver.

6 THE COURT: Thank you. Anybody else?

7 Good morning, everybody. I need to clarify the
8 record from yesterday because the findings of fact and
9 conclusions of law I gave, I gave before I issued the
10 injunction, and I told you over the phone yesterday that I
11 should probably revise my findings of fact and conclusions
12 of law and that's what I've done, and so that's what I'm
13 going to do.

14 Before the Court is an order to show cause why
15 this Court should not preliminarily enjoin the continued
16 enforcement of the omnibus order entered by the Florida
17 District Court pre-petition. The Florida District Court
18 will subsequently be referred to as the Florida Court.

19 This Court hereby incorporates all of the
20 findings of fact and conclusions of law as set forth in
21 this Court's Memorandum of Decision filed and entered on
22 November 2nd, 2007, subsequently referred to as the
23 Memorandum of Decision.

24 (Off the Record - the recorder machine not operating.)

25 The Court hereby incorporates all of the findings

1 of fact and conclusions of law as forth in this Court's
2 Memorandum of Decision filed and entered on November 2nd,
3 2007, subsequently referred to as the Memorandum of
4 Decision. In the Memorandum of Decision, the Court
5 declined to rule on the merits of a preliminary injunction
6 as to enforcement of the omnibus order since that order was
7 at that time stayed by the Eleventh Circuit.

8 The Eleventh Circuit lifted that stay on November
9 5th, 2007 and this Court granted a temporary restraining
10 order enjoining the continued enforcement of the omnibus
11 order. In addition to today's ruling and the Memorandum of
12 Decision, this Court incorporates this Court's comments
13 made on the record at the November 16th, 2007 hearing --
14 Tanya, I need those dates -- go off the record a minute.

15 The Court also incorporates its comments made on
16 11/21, November 21st in court, and I'm checking to see
17 whether there's another date as well.

18 The Receiver argued at the hearing on the order
19 to show cause regarding a preliminary injunction that if
20 this Court determined that the Barton Doctrine did not
21 apply to the Receiver that this Court would be sitting in
22 review of the Florida Court because the Florida Court has
23 allegedly determined that the subject funds are not
24 property of the estate. This Court has fairly reviewed the
25 discussion of the Barton Doctrine as set forth in this

1 Court's Memorandum of Decision at pages 38 through 49. In
2 the Memorandum of Decision, this Court explained why the
3 Court concluded that the Barton Doctrine is not applicable
4 to this adversary proceeding and why this Court had
5 jurisdiction to determine that the Barton Doctrine is not
6 applicable under the facts of this case.

7 Nothing in the Receiver's opposition to this
8 preliminary injunction or in the Receiver's oral argument
9 at the November 16 hearing alters this Court's analysis as
10 set forth in the Memorandum of Decision. Moreover, other
11 Bankruptcy Courts have held that the Barton Doctrine does
12 not apply where a bankruptcy trustee seeks turnover of
13 property of the bankruptcy estate from a custodian. See In
14 re Citix (Phonetic) Corp. 302 B.R. 144, Bankruptcy Eastern
15 District of Pennsylvania 2003; In re Automotive
16 Professionals, Inc. 2000 West Law 1958595, Bankruptcy
17 Northern District of Illinois July 3rd, 2007.

18 The facts of this case are analogous. Here,
19 Debtor seeks to enjoin the turnover of what Debtor asserts
20 is property of the estate. If compliance with the Barton
21 Doctrine is not required in a motion to compel turnover of
22 property held by a custodian, compliance with the Barton
23 Doctrine is also not required to enjoin the Federal
24 Receiver who seeks to obtain custody over property that is
25 very likely property of the estate.

1 Should it later be determined that the Barton
2 Doctrine does apply to the Receiver and that Debtor needed
3 to obtain permission from the Florida Court to sue the
4 Receiver in this court, this Court notes that it's highly
5 likely, as argued by Debtor, that under In re Crown
6 Vantage, Inc. 421 F3d, 963, 9th Circuit, 2005, the Receiver
7 would need to seek relief from this Court to proceed
8 against Debtor in the contempt proceeding in the Florida
9 Court, and the Receiver has not done that. This is so
10 because the Debtor is the debtor in possession of this
11 Chapter 11 bankruptcy case pursuant to Bankruptcy Code
12 Section 1101.1. As debtor in possession of this bankruptcy
13 case, Bankruptcy Code Section 1107 essentially grants the
14 Debtor the rights and powers of a bankruptcy trustee and
15 Debtor performs the functions and duties of a bankruptcy
16 trustee serving in a case under this Chapter.

17 As a bankruptcy trustee, under Crown Vantage,
18 Debtor cannot be sued in a foreign jurisdiction, in this
19 case the Florida Court, without the permission of the court
20 appointing the trustee, in this case, this Court. Crown
21 Vantage likely applies even though Debtor was subject to
22 the Receiver's motion to compel pre-petition. This is so
23 because any post-petition action by the Receiver against
24 Debtor is also against Debtor's bankruptcy estate and not
25 just against the pre-petition Debtor. As such, any post-

1 petition action by the Receiver is against the debtor in
2 possession, the entity that has the rights and powers of a
3 bankruptcy trustee and performs the functions and duties of
4 a bankruptcy trustee serving in a case under this Chapter.

5 The FTC argues that the receivership established
6 by the Florida Court gives the Florida Court in rem
7 jurisdiction over the commingled funds to the exclusion of
8 the bankruptcy estate. The FTC argues that the Ninth
9 Circuit authority of CFTC versus C.O. Petro Marketing
10 Group, Inc. 700 F2d, 1279 at 1281-84, 9th Circuit 1983,
11 stands for the proposition that the Florida Court retained
12 jurisdiction post-petition to order the turnover of subject
13 funds alleged to be property of Debtor's bankruptcy estate
14 and such jurisdiction was not divested by this Court's
15 jurisdiction.

16 This Court does not agree with the FTC's expanded
17 reading of C.O. Petro. In C.O. Petro, as in every other
18 case cited by the FTC regarding this issue, the entity that
19 was the subject of the Federal Receivership was also the
20 entity that was under the bankruptcy protection. That is
21 not the case in this instance. The Ninth Circuit in C.O.
22 Petro cited to *Collier Bankruptcy Manual* for the
23 proposition that the purpose of the broad in rem
24 jurisdiction of the Bankruptcy Court is, and I quote:

25 "To render authority and control of the

1 Bankruptcy Court paramount and all-embracing to
2 the extent required to achieve the ends
3 contemplated by the new legislation and to
4 exclude any interference by the acts of others or
5 by proceedings before other courts where such
6 activities or judicial proceedings would in some
7 way frustrate the jurisdiction of the Bankruptcy
8 Courts. 1 *Collier Bankruptcy Manual* 3.01 at 3-
9 24, 3rd Edition, 1982; C.O. Petro, 700 F2d, at
10 1282."

11 The Ninth Circuit went on to say, and I quote:
12 "Allowing the District Court to enforce its
13 preliminary injunction by directing return of the
14 \$60,000 to the receiver would in no way frustrate
15 the jurisdiction of the Bankruptcy Court.

16 Section 543 of the Act protects the Bankruptcy
17 Court's exclusive jurisdiction over property of
18 the estate by requiring the receiver to preserve
19 it and deliver it to the bankruptcy trustee. 11
20 U.S.C. Section 543, Supplement 4, 1980; Accord
21 S.E.C. versus First Financial Group, 645 F2d, at
22 439. Therefore, Section 1471(e) does not divest
23 the District Court in this case of jurisdiction
24 to issue an order to aid the Receiver in
25 collecting and preserving property of the estate.

1 C.O. Petro. 700 F2d, at 1282 to 1283."

2 And that's the end of that quote. Accord S.E.C. versus
3 First Financial Group of Texas, 645 F2d, 429 at 440, Fifth
4 Circuit 1981.

5 And then I quote:

6 "To the extent that the exercise of a District
7 Court's jurisdiction threatens the assets of the
8 Debtor's estate, the Bankruptcy Court may issue a
9 stay of those proceedings. 11 U.S.C. Section
10 105(a). Additionally 11 U.S.C. Section 543
11 protects the Bankruptcy Court's exclusive
12 jurisdiction over property of the estate by
13 requiring the custodian of such property to
14 preserve it and deliver it to the bankruptcy
15 trustee.

16 In light of these provisions and the ancillary
17 nature of the equitable relief of appointment of
18 a Receiver for the entity in bankruptcy in
19 regulatory enforcement actions, we do not find
20 that the District Court's order was made in
21 contravention of the exclusive jurisdiction
22 provision of 1471(e)."

23 End of quote. And I've omitted a footnote.

24 The facts of C.O. Petro are definitely not the
25 facts of this case. Here, permitting the Receiver to

1 continue enforcement of the turnover order is not an order
2 to aid in collecting and preserving property of the
3 bankruptcy estate that subsequently will be turned over to
4 the Bankruptcy Court for distribution. On the contrary,
5 the Receiver and the FTC's determination to proceed with
6 the omnibus order will remove and dissipate over 1.7
7 million dollars in what is likely property of this
8 bankruptcy estate.

9 As the Ninth Circuit pointed out in C.O.Petro,
10 the District Court was not divested of jurisdiction to
11 enforce a turnover order because permitting the District
12 Court to retain jurisdiction actually aided the bankruptcy
13 estate. That is very different from the facts that are
14 before this Court.

15 The FTC also asserts that issuing a Section 105
16 injunction as to the contempt proceeding would exceed this
17 Court's discretionary authority because the Florida Court
18 orders preclude Debtor from re-litigating the issue of
19 ownership of the subject "reserve," and I put that in
20 quotes, funds, citing In re Renozzo (Phonetic) 477 F3d,
21 1117 at 1122, 9th Circuit 2007. However, the first criteria
22 for the issue of preclusion is not met here, that the issue
23 necessarily decided at the previous proceeding is identical
24 to the one sought to be re-litigated.

25 In the omnibus order, the Florida Court addressed

1 whether the Receiver had a property interest in the
2 abstract. It did not address as to what particular asset
3 that interest attached. The question of whether the
4 Receiver could trace his asserted property interest into
5 any specific funds held by the Debtor was not litigated
6 before the Florida Court. The question here is whether any
7 interest the Receiver had at the time of Debtor's
8 bankruptcy filing attached to specific funds or assets now
9 held by the Debtor. Thus Debtor is not re-litigating the
10 identical issue previously litigated before the Florida
11 Court.

12 Receiver finally asserts that Debtor has not met
13 the standards for injunctive relief under Section 105. As
14 this Court will set forth in greater detail, this Court
15 finds that the Debtor has met its burden for a Section 105
16 preliminary injunction.

17 The standard for injunctive relief in the Ninth
18 Circuit is well settled. A party must show either one, a
19 likelihood of success on the merits and the possibility of
20 irreparable injury or two, the existence of serious
21 questions going to the merits and the balance of hardships
22 tipping in its favor. The required showing of harm varies
23 inversely with the required showing of meritoriousness.
24 Ms. World U.K. Limited versus Miss America Pageants, Inc.,
25 856 F2d, 1445 at 1448, 9th Circuit 1988.

1 In a reorganization context, the Ninth Circuit
2 has said that a Debtor seeking a stay against a non-debtor
3 must show a reasonable or likelihood of successful
4 reorganization. As set forth in detail in the Memorandum
5 of Decision at pages 19 through 21, Debtor has demonstrated
6 that the Debtor had a reasonable likelihood of successful
7 reorganization. The Debtor still has a reasonable
8 likelihood of a successful reorganization. In addition to
9 those findings, on November 2nd, 2007, the Unsecured
10 Creditors' Committee agreed to an additional two weeks for
11 the Debtor's use of cash collateral, while Debtor and the
12 Committee continued discussions for a Plan of
13 Reorganization.

14 At the November 2, 2007 hearing, no creditor
15 opposed Debtor's use of cash collateral based on the
16 viability of Debtor's business. In addition, the
17 Creditors' Committee has consented to Debtor's continued
18 use of cash collateral through November 30, 2007. Only the
19 FTC and the Receiver opposed Debtor's continued use of cash
20 collateral, and that objection was only on the basis that
21 both parties objected to the Debtor using funds in the
22 blocked account. No creditor opposed Debtor's use of cash
23 collateral based on the viability of Debtor's business.

24 For the reasons stated in the Memorandum of
25 Decision and the additional information brought to the

1 Court's attention at the November 2nd and November 16th cash
2 collateral hearings, and the November 21st hearing, Debtor
3 has demonstrated that Debtor has a reasonable likelihood of
4 a successful reorganization sufficient for issuance of a
5 preliminary injunction.

6 Additionally, as set forth in great detail in the
7 Memorandum of Decision at pages 48 to 58, the Debtor has
8 demonstrated a strong likelihood of success on the merits
9 that the property Receiver seeks to have Debtor turn over
10 pursuant to the omnibus order is property of the estate.
11 The omnibus order does not require Debtor to pay any
12 specific amount of funds to the Receiver, rather, in order
13 to comply with the omnibus order, Debtor would have to pay
14 Receiver out of Debtor's general commingled funds as the
15 so-called "reserves" the Florida Court determined Debtor
16 held on behalf of the prior customers.

17 The Florida Court described such reserves, but
18 did not quantify them. Pre-petition, Debtor did not turn
19 over any funds to the Receiver, and Debtor did not
20 segregate any funds in any fashion. As of the petition
21 date, Debtor retained an interest in all of the funds in
22 Debtor's general bank account and Receiver asserted an
23 interest in some as yet unquantified portion of those
24 funds. On the petition date, this Court obtained exclusive
25 jurisdiction over all funds in Debtor's general bank

1 account under Section 1334(e) of Title 28. Accord in re
2 Simon, 153, F3d, 991, at 996, 9th Circuit 1998.

3 Receiver argues at length that this Court is
4 purporting to decide whether the 1.7 million dollars in
5 commingled funds constitutes property of Debtor's
6 bankruptcy estate. It is correct that this Court is of the
7 opinion that as of the filing of the bankruptcy petition,
8 this Court obtained exclusive jurisdiction to determine
9 what is or is not property of the estate. However, it is
10 not necessary for this Court to decide one way or the other
11 whether the 1.7 million dollars is property of Debtor's
12 estate in order to issue a preliminary injunction against
13 enforcement of the contempt proceeding against Debtor and
14 the omnibus order in particular. Rather, this Court need
15 only find that there are serious questions going to the
16 merits of whether the 1.7 million dollars in commingled
17 funds is property of Debtor's estate.

18 The irreparable harm to Debtor of having to turn
19 over those funds to the Receiver is so great that this
20 Court need only find that there are serious questions going
21 to the merits on that issue. In granting Debtor a
22 preliminary injunction, this Court is not reviewing the
23 decision of the Florida Court. Instead, this Court is
24 deciding Debtor's likelihood of success on the merits, and
25 alternatively, that there are serious questions going to

1 the merits in the context of ruling on Debtor's request for
2 a preliminary injunction.

3 In evaluating Debtor's likelihood of success on
4 the merits, this Court also needs to consider the
5 circumstances under which the Florida Court entered the
6 omnibus and clarification orders. The bankruptcy estate
7 did not exist at the time the omnibus order was entered.
8 The bankruptcy estate was not given any opportunity to
9 brief or argue the merits of the FTC's emergency motion
10 prior to the Florida Court issuing the clarification order
11 post-petition.

12 In the clarification order, the Florida Court
13 purported to determine what interest the bankruptcy estate
14 had in the approximately 1.7 million dollars ordered to be
15 turned over to Receiver in the omnibus order, and I say
16 that that was totally unquantified in the omnibus order,
17 without the bankruptcy estate having the opportunity to
18 argue or brief the issue in any way. This is an additional
19 significant reason Debtor is likely to prevail on the
20 merits. Alternatively, Debtor certainly has demonstrated
21 the substantial question going to the merits of the
22 procedure underlying the issuance of the clarification
23 order as well as the merits.

24 Moreover, this Court is not deciding today
25 whether Debtor or the Receiver owns the subject funds.

1 This Court is making no decision today as to who owns those
2 funds. Rather, this Court is only deciding that the Debtor
3 has a likelihood of success on the merits of Debtor's
4 position that the subject funds are property of Debtor's
5 bankruptcy estate. This would be true regardless of
6 whether this Court, the Eleventh Circuit, the Ninth
7 Circuit, or the Supreme Court were ultimately to decide
8 that issue.

9 The Court also notes the Debtor is presently in
10 possession of these commingled funds. Possession of funds
11 is a form of property of the estate. The legal rights of
12 the parties potentially could substantively change if the
13 Debtor were to transfer possession to the Receiver. In
14 addition, Ms. Diemer's point made at yesterday's hearing is
15 well made. The creditors of this bankruptcy estate should
16 not have to litigate their respective rights to Debtor's
17 assets or what constitutes property of the estate in the
18 Florida Court or the Eleventh Circuit. The purpose of
19 bankruptcy is to bring all disputes as to what constitutes
20 property of the estate into one court, and that is the
21 Bankruptcy Court.

22 Initially, in this preliminary injunction, this
23 Court is not issuing an order that is in conflict with any
24 issue that is presently before the Eleventh Circuit.
25 Indeed, the parties, that is Debtor, Receiver and the FTC,

1 have all agreed to pursue the litigation before the
2 Eleventh Circuit, and nothing in this Court's preliminary
3 injunction precludes the parties from doing so. Plus, the
4 Debtor's bankruptcy case is moving very rapidly. By
5 December 7th or before, the parties and this Court may well
6 know much more about what Debtor's reorganization plans
7 will be and whether Debtor even needs the 1.7 million
8 dollars. If not, there will apparently be no good reason
9 why presumably those funds should not continue to be
10 blocked indefinitely.

11 The parties in this court may also have
12 additional information regarding the status of the appeals
13 in the Eleventh Circuit and the FTC's appeal of this
14 Court's Memorandum of Decision. Plus, the Debtor conceded
15 yesterday that the Debtor will not need those funds in
16 December as previously the Debtor said was a possibility.
17 And so the hearing on Debtor's possible request for the use
18 of those funds has gone off calendar for December 14.

19 Debtor will be seriously and irreparably injured
20 if the Receiver and the FTC are permitted to enforce the
21 omnibus order. First, Debtor's business will suffer very
22 substantially and irreparably if Debtor is required to turn
23 over \$1,762,762.56 to the Receiver. Particularly at this
24 critical point in Debtor's reorganization efforts, Debtor's
25 estate will lose the over 1.7 million dollars that appears

1 very likely to be property of this estate. Those funds
2 will not be available to the Debtor or its creditors if
3 they are turned over to the Receiver.

4 Moreover, if Debtor is required to turn over the
5 commingled funds, Debtor will be preferring Receiver over
6 all similarly situated creditors. The Debtor is a debtor
7 in possession and is a fiduciary to all of the Debtor's
8 creditors, inter alia, secured creditors, unsecured
9 creditors, customers, the FTC, and the Receiver. The
10 Receiver certainly doesn't represent all creditors of the
11 Debtor's estate. At most, Receiver represents the
12 receivership estates of the prior customers and the FTC.
13 The Receiver does not seek to have the commingled funds
14 turned over to him to protect those funds for all creditors
15 of Debtor's bankruptcy estate; rather, Receiver seeks
16 possession of those funds for the benefit of the
17 receivership estates of the prior customers, to the
18 exclusion of Debtor's other secured and unsecured
19 creditors.

20 Permitting the Receiver to implement the omnibus
21 order would irreparably harm Debtor's bankruptcy estate by
22 preferring one creditor, the Receiver, over other similarly
23 situated creditors of Debtor, since most, if not all,
24 service contracts provide for the same "reserves." And of
25 course I put the word "reserves" again in quotes.

1 Additionally, as set forth in great detail in the
2 Memorandum of Decision at pages 29 to 35, this is a
3 critical time in Debtor's reorganization. Permitting
4 Debtor to continue -- permitting Receiver, pardon me,
5 permitting Receiver to continue his enforcement of the
6 omnibus order would divert Debtor's president and other
7 personnel from the critical reorganization efforts.

8 Debtor continues actively to pursue a successful
9 reorganization and is working closely with the Creditors'
10 Committee toward that end. Diverting Debtor's management
11 at this critical juncture with the time and attention that
12 would be devoted to addressing the enforcement of the
13 omnibus order would threaten Debtor's reorganization.

14 Finally, in addition to the diversion of Debtor's
15 management from the reorganization process, Debtor will be
16 harmed by incurring substantial legal fees and costs Debtor
17 can ill afford at this juncture if enforcement of the
18 omnibus order is not enjoined. Debtor estimates that
19 Debtor will incur an additional 50 to \$150,000 in fees
20 related to Receiver's request for the turnover of the
21 commingled funds. Receiver argues that the contempt
22 proceedings are largely complete and the orders are self-
23 executing. However, the omnibus order is now on appeal.
24 If the enforcement of the omnibus order is not enjoined,
25 Debtor will have to comply with the order to turn over the

1 funds or show cause why the Debtor should not be held in
2 contempt and then deal with any subsequent appeals of the
3 Florida Court's decision.

4 As set forth in greater detail in the Memorandum
5 of Decision at pages 49 to 52, Receiver asserts that
6 enjoining the contempt proceeding will harm Receiver by
7 one, interfering with the administration of a receivership;
8 two, re-litigating the parties' disputes that have already
9 been addressed by the Florida Court in the omnibus and
10 clarification orders; and three, the dissipation of the
11 approximately 1.7 million dollars that the Florida Court
12 ostensibly required Debtor to turn over to the Receiver.
13 This Court has already addressed why enjoining Receiver
14 does not unduly interfere with the administration of the
15 Florida Court receivership and why the preliminary
16 injunction is not a re-litigation of the omnibus and
17 clarification orders.

18 The alleged harm regarding the dissipation of the
19 funds currently held in the blocked account does not
20 outweigh the threat of irreparable injury to the Debtor
21 should this Court not issue a preliminary injunction.
22 There is no immediate threat of irreparable injury or any
23 injury to the Receiver or the FTC. The funds are held
24 under this Court's direction in a blocked account, and
25 before anything were to happen with those funds, the

1 Receiver and the FTC would be given sufficient notice and
2 have an opportunity to address the Court at that time.

3 Receiver will be protected during the preliminary
4 injunction. At this point, this Court continues to require
5 Debtor to hold 1.7 million dollars approximately in a
6 blocked account and will continue to do so, absent a
7 request from Debtor prior thereto and then only on notice
8 to the Receiver and the FTC. It is certainly not a foregone
9 conclusion that Debtor will be granted permission to use
10 any of those funds. At the hearing to unblock -- if
11 there's a hearing to unblock the account, and we don't know
12 whether that will occur or when that will occur, but by
13 that time, the parties and this Court may well know much
14 more about what Debtor's reorganization plans will be and
15 whether Debtor even needs the 1.7 million dollars to
16 function. If it is not apparent that Debtor absolutely
17 needs those funds, it is highly likely that those funds
18 will continue to remain blocked.

19 This Court could also condition the unblocking of
20 any of those funds or permit the unblocking only of a
21 portion of the blocked funds. Granting a preliminary
22 injunction at this time limits the harm to Receiver because
23 the funds in the blocked account continue to remain in that
24 account and contrary to the Receiver's assertion, it is not
25 readily apparent at this juncture that any of the blocked

1 funds will be unblocked.

2 Although this Court issues the preliminary
3 injunction based on a finding that Debtor has demonstrated
4 a likelihood of success on the merits, this Court need only
5 find that there are serious questions going to the merits,
6 because Debtor has made such a strong showing of a
7 likelihood of irreparable injury if this preliminary
8 injunction would not issue. Alternatively, this Court
9 finds that Debtor has made a very strong showing of
10 irreparable injury and Debtor has demonstrated without a
11 question that there are serious questions going to the
12 merits. Thus based on the facts of this case and
13 consideration of the relative hardship of the parties and
14 the public interest concerns, the Court finds that
15 continued enforcement of the omnibus order severely
16 threatens the integrity of the bankruptcy process and
17 Debtor's prospects for reorganization and a preliminary
18 injunction of continued enforcement of the omnibus order is
19 warranted.

20 Now, the Court also relies on Christopher
21 Village, LP versus United States, 360 F3d, 1319, Fed.
22 Circuit 2004, previously referenced to the parties by the
23 Court. In Christopher Village, the Federal Circuit held
24 that the Court of Federal Claims had exclusive jurisdiction
25 to adjudicate a breach of contract claim, notwithstanding

1 the fact that a District Court and the Fifth Circuit had
2 previously asserted jurisdiction over those claims. The
3 Federal Circuit acknowledged by the general rule that in
4 most circumstances, a judgment may not be collaterally
5 attacked on the ground that the original tribunal lacked
6 subject matter jurisdiction, even if the issue of subject
7 matter jurisdiction has not been litigated in the first
8 action. However, the Federal Circuit held that an
9 exception to that general rule includes situations where,
10 quote, "allowing the judgment to stand would substantially
11 infringe the authority of another tribunal or agency of
12 government." Quoting Restatement Second of Judgments
13 Section 12(2) 1982.

14 And citing to In re Bulldog Trucking versus
15 Productive Transportation Services, Inc., 147 F3d, 347 at
16 354, 4th Circuit 1998, and Sterling versus United States, 85
17 F3d, 1225 at 1231, 7th Circuit 1996; Christopher Village,
18 360 F3d at 1329 to 1330. Here, under Christopher Village
19 where this Court has exclusive jurisdiction over
20 determining what constitutes property of the bankruptcy
21 estate, allowing the clarification order to determine
22 Debtor's rights in property of the estate, would both
23 substantially infringe the authority of this Court and
24 irreparably damage the Debtor and the Debtor's estate.

25 That concludes my findings of fact and

1 conclusions of law. We can -- Mr. Sacks, we need to decide
2 what to do. Do you think we should do an amended order
3 granting motion for preliminary injunction, given that I
4 have issued these findings of fact today, or do you think
5 that's not necessary?

6 MR. SACKS: This is Steven Sacks. I don't think
7 it's necessary. It seems to me that the Court could issue
8 its findings and conclusions after its order.

9 THE COURT: All right. Does anybody disagree?

10 MR. OETZELL: I don't know, Your Honor. And I'm
11 not also sure that Mr. Sacks does either.

12 THE COURT: Okay. Well, I'll leave it as is and
13 then Mr. Sacks, if in your research, you decide that we
14 should do another order, then you should get that to me as
15 soon as possible. The order can be basically the same.
16 It's just that the order refers to -- I'm looking at the
17 order now -- does it refer to the Court having issued its
18 findings of fact and conclusions of law yesterday? And it
19 does.

20 MR. SACKS: It does. It doesn't incorporate
21 findings to be issued today, and so I guess --

22 THE COURT: I think it's safer to issue a new
23 order, an amended order.

24 MR. SACKS: It's easy to do. I'm happy to upload
25 one.

1 THE COURT: Very good.

2 MR. OETZELL: Your Honor, before we worry about
3 this order here, I'm going to make a request that you
4 reinstate the order that you came to yesterday. The order
5 that you came to yesterday preliminarily involved a good
6 deal of problems. What the Debtor has requested you do
7 avoided by your first order yesterday was a direct
8 collision with the District Court whose order the Debtor is
9 flaunting and asking for your complicity in and a direct
10 collision with the Eleventh Circuit that has taken on three
11 critical issues upon which your decision rests. You put in
12 your order yesterday sort of a handle where you would
13 ultimately have control over that property, that we could
14 go ahead; we could go into the District Court, let the
15 District Court enforce its order or not enforce its order,
16 but that property would not be disbursed without a further
17 order from you.

18 Your Honor, what you are being asked to do here
19 is extraordinary, and it is to restrain an agent of the
20 District Court, not the FTC, not an agent of the FTC, but
21 an agent of the District Court that has been appointed to
22 preserve property. I quote to a couple of California cases
23 here about what a receiver is. A receiver is an officer or
24 representative of the court appointed to manage property
25 that is the subject of litigation. The receiver is not an

1 agent of either party to the action, represents all
2 persons. In other words, the receiver acts as a fiduciary
3 on behalf of both parties as a representative and officer
4 of the court. And that language in effect is in the
5 receivership orders that we have here. The receiver is
6 appointed to preserve that property, and that's what this
7 receiver is attempting to do here. In fact, Section 43(a)
8 of the Bankruptcy Code, which section has been referred to
9 a couple of times, specifically exempts actions that
10 preserve the property, that's meant to preserve the
11 property. And that is the problem here. The Debtor seeks
12 to dissipate that property. The Receiver here seeks to
13 preserve that property.

14 In addition to that, Your Honor, Section 547(c)
15 requires the Court to protect the parties to which the
16 Receiver has become obligated, which is all the more reason
17 to preserve that property, the only way that they can be
18 protected. Your Honor had it right yesterday. Your Honor
19 had a situation where -- and I will say this -- there is a
20 standing order here. There is an order from the District
21 Court that the Receiver (sic) turn over this property or
22 show case. It has done neither. It is flaunting that
23 order. And I've argued before and I argue again that
24 enjoining the Receiver which is an extraordinary thing is
25 only a band aid. It's only a stop-gap measure that is not

1 going to stop the District Court from shall we say
2 enforcing that order on its own.

3 I would ask Your Honor to go back to the ruling
4 that you had yesterday that avoided all these problems; let
5 this get straightened in Florida in front of Judge Reiscamp
6 (Phonetic) in front of the Eleventh Circuit, and not run
7 into this collision that is inevitable with enjoining the
8 officer of the District Court.

9 THE COURT: Well, I have a couple questions, and
10 then I'll hear from the Debtor. First, you were telling me
11 I got it right yesterday, but you weren't willing to
12 stipulate to that order, and neither was the FTC, first.
13 And second, the order included a requirement that the
14 Debtor not release any funds. Isn't that a collision with
15 the District Court order and so why do you think the order
16 that I had talked about yesterday was the proper order, if
17 it required the Debtor not to obey the District Court by
18 turning over the funds, but rather to keep the funds
19 protected?

20 Secondly, there's no question that my intention
21 is to protect the funds. They're in a blocked account.
22 Nobody can unblock them without an order of this Court. So
23 I stand between all of the parties and that money because
24 they're blocked. Now I'll go ahead and hear from Mr. Sacks
25 and then you can respond to everything, if you will, Mr.

1 Oetzell. And if the FTC wants to speak, they're certainly
2 welcome. Anybody can speak. Go ahead, Mr. Sacks.

3 MR. SACKS: Thank you, Your Honor. Steven Sacks
4 for the Debtor. Your Honor, I don't think it's necessary
5 to respond fully other than to say that the Bankruptcy
6 Court frequently has occasion to require that parties
7 follow its orders and not those that have previously been
8 issued by State or Federal Courts. This order really is no
9 different than a judgment that commands a payment of money
10 that would ordinarily and should be stayed. In this case,
11 the District Court determined that it wasn't automatically
12 stayed, but ample authority provides that this Court has
13 authority to issue a stay anyway, and far from flaunting
14 the Florida Court's orders, we've come in an orderly way to
15 this Court and asked for protection, and the Court has
16 granted it and continues to grant it. So there is not a
17 collision here. There is exactly what Section 105
18 contemplates, indeed what the Celotex (Phonetic) case and
19 the U.S. Supreme Court said was perfectly appropriate, that
20 when the Bankruptcy Court issues a 105 injunction, that
21 injunction has to be obeyed unless a higher court overturns
22 it, not a court of a different circuit or a prior ruling of
23 another court.

24 I think that probably goes far enough to respond
25 to Mr. Oetzell, other than to say that I think he was

1 citing to Section 543 of the Bankruptcy Code, which deals
2 with the obligations of a custodian, and I think would
3 require that even had we turned over any money to the
4 Receiver or paid any money to the Receiver, prior to or
5 during the bankruptcy, under 543, the Receiver would have
6 to come to this Court and turn it over or at best, if the
7 Court allowed, protect it under the Court's auspices. But
8 it certainly doesn't say in 543 that the Receiver gets to
9 compel the Debtor to turn over money to it. That's all I
10 have, Your Honor.

11 THE COURT: Okay. Does anybody else want to speak
12 before I let Mr. Oetzell respond to everybody?

13 MR. MORA: Yes, Your Honor, Michael Mora for the
14 Commission.

15 THE COURT: Yes, sir.

16 MR. MORA: Your Honor, I just wanted to add that
17 of course the Commission, as we indicated yesterday, would
18 not stipulate and still would not stipulate to the first
19 order that the Court suggested. I think we're just
20 looking -- we of course don't want any order entered, but
21 we just want a decision and an order so that we can know,
22 you know, what our rights and obligations are going
23 forward.

24 THE COURT: I understand, Mr. Mora.

25 MR. MORA: Thank you.

1 THE COURT: Mr. Oetzell -- does anybody else want
2 to saying anything before I turn it back to Mr. Oetzell?

3 Thank you. Go ahead, Mr. Oetzell.

4 MR. OETZELL: Just two things, Your Honor, a) I
5 said yesterday in respect of the order that you had
6 proposed and the order that you had ultimately, not entered
7 but stated on the record, that providing it was without any
8 prejudice to any party's position, which was our party's
9 position that I had no objection to it. I was for that
10 order. Secondly, I understood there is a District Court
11 order that is sitting there -- this is an 800-pound gorilla
12 that everybody is ignoring -- that compels the Debtor to
13 turn over the funds or show cause why it hasn't. That
14 order is -- Mr. Sacks has not explained exactly how the
15 Bankruptcy Court can enjoin that order or its operation.
16 And enjoining the Receiver does not enjoin that order or
17 its operation; it's merely a band aid, and it is
18 interfering with the Receiver's duties.

19 THE COURT: I understand, Mr. Oetzell. If I --

20 MR. OETZELL: You had a perfectly acceptable order
21 yesterday, and --

22 THE COURT: Well, apparently the FTC doesn't think
23 so, and they think --

24 MR. OETZELL: Oh, you know what, the FTC --

25 THE COURT: Mr. Oetzell, let me finish my sentence

1 because we're on a recording, and if you don't let me
2 finish my sentence, we're going to get a muffled record.

3 MR. OETZELL: Sorry, Your Honor, I apologize.

4 THE COURT: Muddled rather than muffled. It may
5 be both, but -- the FTC says that it is the real party in
6 interest, not you. And the FTC wouldn't go along with that
7 order. In fact, what they apparently want to do is
8 appeal -- if I issue any order, appeal it, so they get a
9 determination of their rights from a higher court. And I
10 respect that. So there's no way to work out an arrangement
11 that would be acceptable to all of the parties here. I've
12 tried extremely hard to do that, and I certainly understand
13 your position, Mr. Oetzell. I thought that if I just -- if
14 you agreed, that I would just keep the funds blocked here
15 and give you plenty of time if anybody sought to unblock
16 them, that you could accept that. And if you could accept
17 that, since you're the party before the District Court in
18 the contempt proceeding, you could go back to the District
19 Court and say I have agreed. They're going to give me
20 enough notice, so I'll have plenty of time to protect my
21 rights, if and when the Debtor ever comes back and says the
22 Debtor needs the money. And we could negotiate an amount
23 of time, a minimum amount of time the Debtor would need.

24 But that was unacceptable to you, and I frankly
25 far prefer that outcome to the current outcome, but you

1 wanted absolute certainty that nothing will be done until
2 the Eleventh Circuit rules, and we don't know when the
3 Eleventh Circuit will rule or what the Eleventh Circuit
4 will rule. And of course, the Debtor has the right to seek
5 to amend its complaint and you acknowledge that. So in any
6 event, I tried very hard to work something out so that the
7 Receiver wouldn't be enjoined, and I still am interested in
8 hearing if you can work something like that out. Then I
9 don't have to enjoin the Receiver. I'm a Federal Court. I
10 will keep the funds blocked. We'll give you plenty of
11 notice if the Debtor seeks to unblock the funds. All this
12 litigation could stop.

13 I don't know whether the FTC would go into the
14 District Court if you worked out a stipulation with the
15 Debtor here. I don't know whether the FTC would take an
16 independent course of action and go into the District Court
17 and say something contrary to what you say. I can't
18 imagine it but perhaps they would. I don't know the
19 relationship well enough between the Receiver and the FTC
20 to know whether that would be a possibility.

21 But maybe you should reconsider. Maybe you
22 should consider the path that I suggested, and that is I'll
23 keep them in a blocked account here. Nobody will touch
24 them. If anybody wants to touch them, whether you want to
25 touch them or the FTC wants to touch them or the Debtor

1 wants to touch them, there will be a minimum amount of
2 notice to give all parties, and there would be no
3 injunction necessary.

4 MR. OETZELL: Your Honor, you know obviously we'll
5 consider everything, but I will tell you that from our
6 perspective as the Receiver, once the Receiver was
7 appointed, the Receiver's duties include --

8 THE COURT: Can you keep your voice up, please.

9 MR. OETZELL: I'm sorry. Once the Receiver was
10 appointed in this FTC action, the Receiver took the role of
11 preserving the assets, and as a consequence, you know, when
12 there's a -- you can see when there's a difference of
13 opinion as between the FTC and the Receiver, the Receiver's
14 duty is to preserve the assets. That's what our order
15 requires, and that's what everything that I am attempting
16 to do is being done. And again, I would say that your
17 order yesterday did that. And it also recognized the fact
18 that there is a standing order out there that, you know,
19 has to be complied with at some point, or it has to be
20 argued against in Florida.

21 THE COURT: Not necessarily. That order could be
22 overturned by the Eleventh Circuit.

23 MR. OETZELL: That's true too, but once again,
24 what I'm saying is that we should not be on a collision
25 course with the District Court's order or the Eleventh

1 Circuit. We should not be taking any action that will
2 conflict with either of those two courts. The action is in
3 Florida, and things can be taken care of in Florida and
4 could be taken care of in Florida under your order
5 yesterday.

6 THE COURT: Well, I will say this, and that is,
7 that if for some reason this injunction is overturned on
8 appeal, then alternatively I will issue the injunction or I
9 do now issue the injunction that I issued or talked about
10 yesterday. It'll be an alternative, so that if for some
11 reason this injunction were overturned as being erroneous,
12 then assuming that the Court has the power to issue an
13 injunction in the alternative, that's what I'll do.

14 But I understand you, sir. I wish there were
15 some way to do it. I guess you don't trust the fact that
16 the Bankruptcy Court will preserve the funds or at least
17 give you more time than you have now to go seek further
18 redress, and I can't -- you want something that's a
19 certainty and I understand that, and you don't want to
20 agree to anything less than that.

21 MR. OETZELL: Well, Your Honor, it's not a
22 question of trusting the Bankruptcy Court or not trusting
23 the Bankruptcy Court, and --

24 THE COURT: Sure it is. Sure it is.

25 MR. OETZELL: -- I appreciate all the effort and

1 thought that you have put into this, including, you know,
2 calling this hearing today to clarify your order. There's
3 not many courts that would do that, and, you know, it's
4 obvious that you put so much thought into this and a lot of
5 worry into this, and I certainly appreciate that. It's
6 just an issue that in the end the Debtor's goal in this
7 thing is to get those funds and to spend them. And that is
8 just something that is not subject to argument, and it is
9 the Receiver's duties to preserve those funds. And that is
10 why I am concerned, and that is why I'm asking for a
11 certainty.

12 THE COURT: Okay. But I stand between the Debtor
13 and those funds.

14 MR. OETZELL: I understand, Your Honor.

15 THE COURT: Thank you, sir. Okay, ladies and
16 gentlemen, we'll issue a new order. Does anybody else wish
17 to say anything before I wish you a good lunch or I guess
18 if you're at the FTC, it's 3:00 o'clock there.

19 MR. MORA: Your Honor, Michael Mora for the
20 Commission.

21 THE COURT: Yes, sir.

22 MR. MORA: Your Honor, may I just ask for
23 clarification, at the end there, that Your Honor will be
24 issuing the order that you entered last night but also an
25 alternative order?

1 THE COURT: You know, Mr. Mora, to be honest with
2 you, I'll ask all of you. I've never done it before, so
3 I'll ask you. Is a court allowed to issue an injunction
4 that has two components, the first component is the
5 injunction I issued today, and if for some reason that
6 overturned, then the injunction that I discussed on the
7 record yesterday. If I have that power, that's what I
8 would like to do.

9 MR. MORA: I don't know the answer to that
10 question, Your Honor.

11 MR. OETZELL: Your Honor, I don't know the answer
12 to that question either, and I would -- you know, we can
13 look into it, but --

14 THE COURT: So I'll issue the first -- when I say
15 first, that could get confusing -- I'll issue the
16 injunction that I issued today and if I have the power, I'd
17 like everybody's position within a week in a brief -- I'd
18 like to know whether you think I have the power to issue
19 any alternative, so yesterday's injunction discussed on the
20 record yesterday would be in the alternative if for some
21 reason this injunction is overturned.

22 MR. SACKS: Your Honor, Steven Sacks. It seems to
23 me that the Court has power to issue an order today that
24 says that a), the Receiver is enjoined; the FTC is
25 enjoined, as the Court issued yesterday. And in addition,

1 if for any reason the Receiver comes into control of the
2 money that's presently in the blocked account or otherwise
3 is able to compel Integretel to pay it 1.7 million dollars,
4 that the Court enjoins the Receiver from doing anything
5 with that money --

6 THE COURT: Pending further order of this Court.

7 MR. SACKS: Right.

8 MR. OETZELL: That's not the issue. The issue is
9 whether Your Honor can sit there and say that the -- on the
10 alternative that the Receiver is not enjoined and basically
11 go back to your order yesterday.

12 THE COURT: No, no, I think he's right, Mr.
13 Oetzell, with all due respect, and let me just explain to
14 you why, because the purpose would be to issue the
15 injunction that I discussed today on the record and issued
16 today on the record or in the alternative if for some
17 reason the Receiver were to obtain those funds, the
18 Receiver would be enjoined from distributing them to
19 anybody pending further order of the Court. That's exactly
20 what I intend.

21 MR. OETZELL: Well, you know, I'm not so sure. I
22 mean if the injunction is overturned, I guess the answer is
23 the injunction is overturned.

24 THE COURT: Right. And you can argue that in the
25 appeal, that the alternative part of the injunction should

1 be stricken by the Appellate Court.

2 MR. OETZELL: I certainly would like Mr. Sacks to
3 explain the authority by which somebody can -- a court can
4 issue an injunction and then a back-up if it gets
5 overturned.

6 THE COURT: (Laughing.) Right. I guess that is
7 the question, Mr. Sacks. So, Mr. Sacks, rather than doing
8 that, I'll just go ahead and issue my injunction today and
9 if you can provide me some authority that I can have a
10 back-up injunction, that's what my intent would be. I
11 would like to do it if I have the authority.

12 MR. SACKS: Your Honor, Steven Sacks again. I
13 don't think it is a back-up; I think what it is, is an
14 alternative circumstance that may arise, which is, as the
15 Receiver and the FTC argue, somehow the District Court may
16 compel something to happen even though they're enjoined.
17 Let's say the injunction is not overturned, and somehow we
18 are required under penalty of otherwise going to jail I
19 guess, to pay money to the Receiver. And in that case,
20 this Court's order would be in effect, which is that the
21 Receiver couldn't do anything with that money without the
22 Bankruptcy Court's further order. I don't see it as an
23 alternative; I see it as part of the Court's review of the
24 situation and part of the Court's order.

25 THE COURT: So it wouldn't be only if I got

1 reversed. It would be if for any reason the Receiver
2 became in possession of those funds.

3 MR. SACKS: That's my view, Your Honor. Steven
4 Sacks speaking.

5 THE COURT: Go ahead, Mr. Oetzell.

6 MR. OETZELL: That's called a back-up. And also I
7 think it's based upon speculative circumstances, and I
8 don't think that's appropriate for an injunction.

9 MR. MORA: And, Your Honor, this is Michael Mora
10 for the Commission. Also this is obviously something new
11 that certainly we didn't have advance notice of, but on the
12 spot, I would say that a back-up order like that would be
13 tantamount to -- because it would only be the District
14 Court judge itself who would have acted under those
15 circumstances -- being postulated. So that would be
16 tantamount to enjoining the District Court itself.

17 THE COURT: Well, but remember that's what the
18 order was yesterday and that's what Mr. Oetzell wanted.

19 MR. OETZELL: Well, that was in a situation -- in
20 somewhat of a compromised situation in respect to this
21 particular hearing, these particular circumstances. Now we
22 have an order restraining us. If that order gets
23 overturned, that order gets overturned. We don't sit
24 there -- we don't sit there and put in back-up provisions
25 to ameliorate an order getting overturned.

1 THE COURT: Well, Mr. Sacks, I'm not sure because
2 nobody has had an opportunity to look at this, but I think
3 you may be right. Take a few days and write a brief, and
4 I'll look at it, and I'll give you a couple of days and
5 I'll give the FTC and the Receiver a couple of days, and if
6 all you want to say is what you said in your papers, fine.
7 But if you can find some law on it, fine. And we are now
8 November 27th, so why don't you take until November 30th, Mr.
9 Sacks, and do we still have a hearing on the 7th, by the
10 way?

11 MR. SACKS: We do have matters on calendar for the
12 7th, Your Honor.

13 THE COURT: All right. And the FTC and the
14 Receiver can have until the 5th. I need it by no later than
15 3:00 p.m. California time which is 6:00 p.m. the Receiver's
16 time on the 5th.

17 MR. SACKS: 3:00 p.m. on the -- I'm sorry.

18 THE COURT: It's not the Receiver's time, I'm
19 sorry; it's the FTC's time. I need it by 3:00 p.m. on the
20 5th, California time.

21 MR. OETZELL: That's the response?

22 THE COURT: Yes, sir.

23 MR. OETZELL: I'm sorry, the actual --

24 THE COURT: The 30th.

25 MR. OETZELL: The 30th.

1 THE COURT: And we'll give it to you by 3:00 p.m.
2 on the 30th too.

3 MR. OETZELL: Thank you, Your Honor.

4 THE COURT: Thank you very much, counsel.

5 ALL COUNSEL: Thank you, Your Honor.

6 THE COURT: Mr. Sacks, you better get in a new
7 order right away.

8 MR. SACKS: I'm going to upload a new order.

9 THE COURT: Thank you, sir. Court is adjourned.

10 (Whereupon, the proceedings are concluded at 12:05
11 p.m.)
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CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript from the digital sound recording of the proceedings in the above-entitled matter.

DATED: December 4, 2007

By: /s/ Jo McCall